80518-1

APPEAL NO. 34025-9-II

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RANDALL J. PATTON,
Petitioner.

PETITION FOR REVIEW

SKAMANIA COUNTY SUPERIOR COURT
NO. 05-1-00061-7
The Honorable E. THOMPSON REYNOLDS, Judge

George A. Kolin
Attorney for Petitioner
WSBA #22529
Post Office Box 173
Washougal, WA 98671
(360)835-8101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND OTHER AUTHORITY: PAGES

A. Identity Of Petitioner

Randall J. Patton is the Petitioner herein.

B. Court Of Appeals Decision

Petitioner requests review of the April 10, 2007 Court Of Appeals, Division Two, No. 34025-9-II Unpublished Opinion (seven pages, attached at Appendix), reversing the trial court' suppression of evidence, from the Skamania County Superior Court.

Petitioner filed a Motion for Reconsideration on April 30, 2007.

Petitioner also requests review of the June 26, 2007 order denying the Petitioner's Motion for Reconsideration (two pages, attached at Appendix).

C. Issues Presented For Review

1. Was the Petitioner Seized Under Article I Section 7, So As

To Permit the Subsequent Warrantless Search of the Petitioner's Automobile?

2. Was the Petitioner Seized Under the Fourth Amendment, So As To Permit the Subsequent Warrantless Search of the Petitioner's Automobile?

D. Statement of the Case

Both Parties stipulated to a set of facts set out in CP 5-9 and 10-14, and such facts were incorporated by the trial court in a written Findings of Fact. CP 15-19.

On March 19, 2005, the Petitioner was arrested after his automobile was searched following his arrest. CP 1-2.

According to stipulated facts at CP 16 lines 11-12: it was so dark that Skamania County Sheriff's Deputy Converse did not see anybody at the Petitioner's automobile until he noticed that the dome light turned on. There was a warrant issued for

the Petitioner's arrest.

The Deputy decided to apprehend the Petitioner. CP 16 lines 14-15; CP 11 lines 5-21.

Deputy Converse drove up, headlights and spotting lights on, yelling "place you hands behind your back, you're under arrest!" CP 16 lines 11-25.

Only the Petitioner's head was inside the automobile when this confrontation took place. CP 16 lines 18-20.

Petitioner immediately ran into a nearby trailer upon being verbally confronted. CP 16 lines 21-23.

There is absolutely no evidence that the Petitioner yielded to Deputy Converse's demands, or that Deputy Converse placed a hand on the Petitioner.

After apprehending the Petitioner from inside of the "barricaded" trailer and then placing him into Deputy Converse's custody (CP 12 lines 3-8), Sheriff's Sergeant Robison took the liberty to search the Petitioner's automobile

without a warrant. CP 12 lines 11-13; CP 17 lines 10-15.

Following the CrR 3.6 hearing, the trial court entered a Findings of Fact and Conclusions of Law Re: Motion to Suppress Evidence, suppressing the evidence. CP 15-19.

The trial court concluded that the warrantless search of the Petitioner's automobile could not be justified as incident to the Petitioner's arrest.

E. Argument Why Review Should Be Accepted

1. The Decision of the Court Of Appeals, Division II, is in conflict with a decision of the Washington State Supreme Court and Article I Section 7.

Division II's Decision is inconsistent with State v. O'Neill, 148 Wn.2d 564, 62 P.2d 489 (2001) and Article I, Section 7.

O'Neill at 585 states: "Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. ... It is the fact of arrest itself that provides the "authority of law" to search, therefore making the search permissible under article I, section 7. ... Thus, while the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, ***in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made.*** ... Thus, ***probable cause for a custodial arrest is not enough***. There must be an ***actual custodial arrest*** to provide the "authority" of law justifying a warrantless search incident to arrest under article I, section 7." Emphasis added.

In Petitioner's case, there was a warrant issued for his arrest. The Petitioner was not in ***actual custodial arrest*** until he was physically apprehended and placed in custody while he was inside of the trailer.

Based upon the Decision, now the police can search every automobile, vessel, home, and/or establishment where a suspect runs through or inserts a limb or head into, before that fleeing suspect either yields or finally gets placed into actual custodial apprehension.

If a defense counsel and client agree to have the police apprehend the client peacefully in the counsel's office, then a full search of counsel's offices is now permitted? If counsel takes client to the Sheriff's offices for a peaceful surrender, then shouldn't the Sheriff now have the right to search counsel's automobile? And why not search counsel's offices if the client was there prior to getting to the Sheriff's Offices?

Potential abuse of this mandate is clear. This is clearly "an issue of substantial public interest" under RAP 13.4(b)(4).

Under the Petitioner's circumstances, Division II does not subscribe to the law established under O'Neill and Article I Section 7, and should be reviewed under RAP 13.4(b)(1) and

RAP 13.4(b)(3).

2. The Decision of the Court Of Appeals, Division II, is in conflict with a decision of the Federal Supreme Court and the Fourth Amendment.

Division II's Decision is inconsistent with California v. Hodari D., 499 U.S. 621 (1991), and the Fourth Amendment.

Hodari D. at 626 framed the issue as follows: "whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not."

Hodari D. involved a foot chase where youths started running away from an approaching unmarked police car. One youth dropped crack cocaine before getting tackled by an officer.

There was no warrant, but that does not bear on the applicability of Hodari D. to the analysis of the Petitioner's

circumstances.

Hodari D. at 624 quotes with approval the following: "To constitute an arrest, however -- the quintessential "seizure of the person" under our Fourth Amendment jurisprudence -- the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient."

And at 625, Hodari D. quotes the following: "[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him."

In Petitioner's case, the Deputy certainly had a right to arrest through the arrest warrant.

The Deputy simply never accomplished arresting the Petitioner. There is no evidence on the record that the Petitioner was touched until after back-up officers physically apprehended the Petitioner inside the trailer.

However, and even under Fourth Amendment analysis, a touch is not essential:

"An arrest requires either physical force ... or, where that is absent, submission to the assertion of authority." Hodari D. at 626.

"Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest, followed by submission of the arrestee, constitutes as arrest. There can be no arrest without either touching or submission." Hodari D. at 626-27.

Hodari D. at 627 makes it clear that this analysis is consistent with the holding of United States v. Mendenhall, 446 U.S. 544 (1980).

Hodari D. at 627-28 clarified Mendenhall and its progeny on the following point: "A person is "seized" within the

meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave", with the following clarification:

"It says that a person has been seized "only if", not that he has been seized "whenever"; it states a necessary, but not a sufficient, condition for seizure - - or, more precisely, for seizure effected through a "show of authority." Mendenhall establishes that the test for existence of a "show of authority" is an objective one: ***not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person***." Emphasis added.

To clear any confusion, Hodari D. at 628 noted Brower v. Inyo County, 489 U.S. 593 (1989), where police cars cased the decedent for 20 miles until his fatal crash into a police-erected blockade. The issue in the subsequent civil rights lawsuit was

whether the decedent's death could be held to be the consequences of an unreasonable seizure in violation of the Fourth Amendment. Hodari D. surmises: "We did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, that "show of authority" did not produce his stop."

So it is clear that under Federal Supreme Court authority and the Fourth Amendment, the Petitioner was not seized until after he was actually apprehended inside of the trailer.

Hence the search of the Petitioner's automobile under the theory that his head was inside of it when the Deputy yelled at him that he was under arrest, was without lawful justification.

Under the circumstances of the Petitioner's case, Division II apparently does not subscribe to the law established under Hodari D. or the Fourth Amendment, and should be reviewed under RAP 13.4(b)(1) and RAP 13.4(b)(3).

F. CONCLUSION

Division II has not followed constitutional Mandates affecting the circumstances that are found in the Petitioner's case.

This Court should accept for review this Petition for the reasons indicated in part E., should grant the Petition, and should suppress the evidence, as the trial court had originally done so.

July 24, 2007.

Respectfully submitted,

George A. Kolin, WSBA #22529
Attorney for Petitioner

APPENDIX OF DOCUMENTS

Unpublished Opinion (7 pages).

Order Denying Appellant's Motion To Reconsider And Amending Opinion (2 pages).

Unpublished Opinion (7 pages).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. RANDALL J. PATTON, Respondent.	No. 34025-9-II UNPUBLISHED OPINION

ARMSTRONG, J. -- The State appeals the trial court's order suppressing evidence obtained in a warrantless search of Randall J. Patton's vehicle, arguing that the search was incident to Patton's arrest. Because the arresting officer told Patton he was under arrest and a reasonable person in Patton's position would have concluded that he was under arrest when he was in the open door of his vehicle, the officers could search Patton's vehicle incident to his arrest. Accordingly, we reverse.

FACTS

On the night of March 19, 2005, Skamania County Sheriff's Deputy Tim Converse went to a trailer to arrest Randall J. Patton on an outstanding felony warrant.[1] Converse saw Patton's vehicle parked outside the trailer.

[1] The parties did not dispute the underlying facts. Neither party presented testimony at the CrR 3.6 hearing.

While waiting for back up, Converse saw the dome light in the vehicle come on and saw Patton "rummaging around" inside the driver's door. Clerk's Papers (CP) at 16. Concerned that Patton might drive away, Converse approached, told Patton he was under arrest, and ordered him to put his hands behind his back. Patton, who still had his head inside the vehicle when Converse spoke, stood up and ran inside the trailer. Converse pursued Patton but was unable to open the trailer's door.

A few minutes later, two other sheriff's deputies arrived. They entered the trailer, handcuffed Patton, and put him in Converse's patrol car. The deputies then searched Patton's vehicle and found two baggies of suspected methamphetamine and $122 in cash under the driver's seat.

The State charged Patton with one count of unlawful possession of methamphetamine and one count of resisting arrest. Patton moved under CrR 3.6 to suppress the evidence obtained from his vehicle. The trial court granted the motion, concluding that Patton was not under arrest until he was taken into physical custody in the trailer. The State appeals.

ANALYSIS

The State contends that the trial court erred in concluding that the search of Patton's vehicle was not incident to his arrest. We agree.

Where, as here, the parties do not challenge a trial court's findings of fact, we treat them as verities on appeal. *State v. Shaver*, 116 Wn. App. 375, 379, 65 P.3d 688 (2003). We review a trial court's conclusions of law in a suppression order de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The United States and Washington constitutions protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WASH. CONST. art. I, § 7. Warrantless searches are per se

unreasonable unless they fall within one of the exceptions to the warrant requirement. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). These exceptions are narrowly drawn and jealously guarded. *Parker*, 139 Wn.2d at 496. The State bears the burden of showing that a warrantless search falls within an exception. *Parker*, 139 Wn.2d at 496.

One exception to the warrant requirement is a search incident to arrest. *State v. Stroud*, 106 Wn.2d 144, 147, 720 P.2d 436 (1986) (plurality opinion). Police officers may search the area within an arrestee's immediate control incident to a lawful arrest to ensure officer safety and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). When an arrestee is occupying a vehicle at the time of arrest, the police may search the vehicle's entire passenger compartment incident to the arrest. *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); *Stroud*, 106 Wn.2d at 152. A search incident to arrest is permitted "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car." *Stroud*, 106 Wn.2d at 152.

The State argues that Patton was under arrest at the moment Converse stated he was under arrest and, therefore, the officers could lawfully search Patton's vehicle incident to his arrest.[2]

A person is under arrest for constitutional purposes when, by a show of authority, his freedom of movement is restrained. *State v. Holeman*, 103 Wn.2d 426, 428, 693 P.2d 89 (1985)

[2] Contrary to Patton's assertion, the trial court did not make a finding of fact that Patton was not under arrest when he was in or near his vehicle. The findings of fact merely describe the sequence of events. The trial court concluded as a matter of law that Patton was not under arrest while at his vehicle, and the State properly assigned error to the trial court's conclusions of law.

(citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). The test is whether a reasonable person, under the circumstances, would have believed he was in custody. *State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413 (1997). The officer's subjective intent is irrelevant unless reflected in his actions. *State v. O'Neill*, 148 Wn.2d 564, 574-77, 62 P.3d 489 (2003). The crucial questions include whether, and to what extent, the officer has used force or displayed authority. *See O'Neill*, 148 Wn.2d at 577.

Here, Converse did not use force to physically apprehend or restrain Patton while Patton was in or near his vehicle. But Converse did display authority—he told Patton he was under arrest and instructed him to place his hands behind his back. A reasonable person, upon hearing a law enforcement officer tell him he is under arrest, would conclude that he is in fact under arrest and is therefore not free to leave.[3]

Patton points out that the trial court made no finding that he was actually aware of a show of authority by a law enforcement officer constituting an arrest. He cites the definition of arrest from *State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977) (holding that a person is under arrest "from the moment [he was] not, and knew [he was] not, free to go"), *overruled by State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). Br. of Respondent at 6-8. But *Williams* overruled the *Byers* definition of arrest because the *Byers* rule blurred the distinction between an

[3] Courts have developed a body of case law to determine when a person is under arrest if the officer has *not* explicitly informed the person he is under arrest. *See, e.g., Rivard*, 131 Wn.2d at 76 (considering factors "commonly associated with an arrest," such as physical apprehension or restraint, handcuffing, being placed in police vehicle or transported to a police station, drawing of a weapon, and reading of rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Where the officer *does* explicitly state that a person is under arrest, consideration of these factors is superfluous.

arrest and a *Terry*[4] stop. *Williams*, 102 Wn.2d at 741 n.5. We now define an arrest by an objective standard: whether a reasonable person in the same situation would believe he is under arrest. *See Rivard*, 131 Wn.2d at 75-76.

Patton relies on *State v. Rathbun*, 124 Wn. App. 372, 101 P.3d 119 (2004). There, Rathbun was standing in the open door of his truck when police officers approached in a patrol car intending to execute an arrest warrant. *Rathbun*, 124 Wn. App. at 375. Upon seeing the officers, Rathbun ran about 40 to 60 feet from his truck and jumped over a fence; the officers apprehended him on the other side of the fence. *Rathbun*, 124 Wn. App. at 375. Twenty-five to thirty seconds elapsed from the time the officers turned into Rathbun's driveway to the time they apprehended him. *Rathbun*, 124 Wn. App. at 375. The officers searched Rathbun's truck and found methamphetamine and various drug paraphernalia. *Rathbun*, 124 Wn. App. 375.

We held that the search of Rathbun's truck was not a lawful search incident to arrest. *Rathbun*, 124 Wn. App. at 380. We explained that the test is whether the vehicle was within the arrestee's immediate control "'*at the time the police initiate[d] an arrest.*'" *Rathbun*, 124 Wn. App. at 378 (quoting *State v. Porter*, 102 Wn. App. 327, 333, 6 P.3d 1245 (2000) (emphasis in original). We concluded that Rathbun did not have "immediate control" of his vehicle at the time the officers initiated the arrest, 40 to 60 feet away from the truck and on the other side of a fence. *Rathbun*, 124 Wn. App. at 378.

Rathbun is distinguishable. Here, Converse initiated the arrest (by informing Patton he was under arrest) while Patton was standing in the open door of his vehicle. At that moment, the vehicle was within Patton's immediate control; he had the opportunity to destroy evidence or obtain a weapon from within the vehicle. Thus, the justifications underlying the search incident

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

to arrest exception were present. *See Stroud*, 106 Wn.2d at 151-52. Rathbun, on the other hand, ran from his truck when he saw the officers' patrol car turn into his driveway. *Rathbun*, 124 Wn. App. at 378. Although the officers intended to arrest him, their subjective intent was irrelevant. *O'Neill*, 148 Wn.2d at 574-77. A reasonable person would not conclude he was under arrest if he merely saw a patrol car turn into his driveway. *See Rivard*, 131 Wn.2d at 75. Thus, the officers had not initiated the arrest at the time Rathbun was standing in the door of his truck. Rathbun did not have control over his vehicle when the officers began the arrest process; Patton did have control of his vehicle when Converse began the arrest process.[5]

Finally, Patton argues that he had no way of knowing whether the officer was truly a police officer. He reasons that a burglar or home invader could have made the same statement. But Patton did not argue this below and the trial court did not litigate it. We generally do not consider arguments advanced for the first time on appeal, and we decline to do so here. *See State v. Williams*, 137 Wn.2d 746, 749, 975 P.2d 963 (1999).

The trial court erred in concluding that Patton was not under arrest when Converse told Patton he was under arrest while he stood in his vehicle's open door. The search of Patton's vehicle was a lawful search incident to his arrest and the trial court erred in suppressing the evidence obtained from the search.[6]

---

[5] Moreover, under the trial court's reasoning, a person who flees when an officer tells him he is under arrest but before the officer takes physical custody of him could not be charged with resisting arrest, an illogical result. *See* RCW 9A.76.040(1) ("A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him.").

[6] Patton also asks this court to find that there is a "trend" of bootstrapping vehicle searches incident to the arrest of persons with outstanding arrest warrants. Br. of Respondent at 11. But the search incident to arrest exception does not depend on the reason why the officer makes the arrest; it is instead based on securing officer safety and preventing the destruction of evidence. *Belton*, 453 U.S. at 457. These concerns are present no matter what the reason for the arrest.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Houghton, C.J.

Penoyar, J.

And, contrary to Patton's assertions, an arrest under a valid arrest warrant is not merely a pretext to obtain a search of a vehicle; it is a valid exercise of police authority. We decline to consider Patton's argument.

Order Denying Appellant's Motion To Reconsider And Amending Opinion (2 pages).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

RANDALL J. PATTON,

Respondent.

No. 34025-9-II

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND AMENDING OPINION

The unpublished opinion in this matter was filed on April 10, 2007. Upon the motion of the appellant for reconsideration, it is hereby

ORDERED that the appellant's motion for reconsideration is hereby denied. It is further

ORDERED that the opinion previously filed on April 10, 2007, is hereby amended as follows:

(1) Pages 3-4, lines 18-25, the text shall be deleted.

Pages 3-4, beginning at line 18, the following text shall be inserted:

> A person is under arrest for constitutional purposes when, by means of physical force or a show of authority, his freedom of movement is restrained. *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998) (citing *United States v. Mendenhall*, 466 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). The test is whether a reasonable person, under the circumstances, would have believed he was not free to leave. *Young*, 135 Wn.2d at 510 (quoting *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981)). The officer's subjective intent is irrelevant unless reflected in his actions. *State v. O'Neill*, 148 Wn.2d 564, 574-77, 62 P.3d 489 (2003). The crucial questions include whether, and to what extent, the officer has used force or displayed authority. *See O'Neill*, 148 Wn.2d at 577.

(2) Page 4, footnote 3, lines 2-3, the following text shall be deleted:

Rivard, 131 Wn.2d at 76.

Page 4, footnote 3, line 2, the following text shall be inserted:

State v. Rivard, 131 Wn.2d 63, 76, 929 P.2d 413 (1997).

(3) Page 5, line 3, the following text shall be deleted:

See Rivard, 131 Wn.2d at 75-76.

Page 5, line 3, the following text shall be inserted:

See Young, 135 Wn.2d at 509-10.

(4) Page 6, line 5, the following text shall be deleted:

See Rivard, 135 Wn.2d at 509-10.

Page 6, line 5, the following text shall be inserted:

See Young, 135 Wn.2d at 109-10.

IT IS SO ORDERED.

DATED this 26TH day of JUNE, 2007.

Armstrong, J.

We concur:

Houghton, C.J.

Penoyar, J.